Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM 1994

♦ ♦ ♦ ♦ ♦

ROHN MARTIN ISHMAEL and
DEBRA K. ISHMAEL

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

♦ ♦ ♦ ♦ ♦

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

♦ ♦ ♦ ♦ ♦

DEBRA K. ISHMAEL'S PETITION FOR WRIT OF CERTIORARI

♦ ♦ ♦ ♦ ♦

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27pp

♦ ♦ ♦ ♦ ♦

QUESTIONS PRESENTED FOR REVIEW

♦ ♦ ♦ ♦ ♦

1. Is a warrantless FLIR search constitutionally proscribed?

2. Does a business curtilege lose its Fourth Amendment protection because it is located in an "open field" adjacent to a residence?

CERTIFICATE OF INTERESTED PERSONS

♦ ♦ ♦ ♦ ♦

The following is a list of all parties to the judgment which is sought to be reviewed.

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Represented By:
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The United States of America, Respondent

Represented By:
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TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Certificate of Interested Persons	ii
List of Authorities	v-vii
Opinions Delivered by Other Courts In This Case	1
Statement of Jurisdiction	
Jurisdiction of District Court	2
Jurisdiction of Fifth Circuit Court of Appeals	2
Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved In This Case	
Jurisdictional Statutes	2-3
United States Constitution	3
Offense Statutes	3-4
Rules of Criminal Procedure	4
Statement of the Case	
Course of proceedings and disposition in court below	4-5

	Page
Statement of Facts	5-6
Jurisdiction of the Courts Below	
U.S. District Court	7
5th Circuit Court of Appeals	8
Reasons Writ of Certiorari Should Be Granted	
Is a warrantless FLIR search constitutionally proscribed?	8-15
Does a business curtilege lose its Fourth Amedment protection because it is located in an "open field" adjacent to a residence?	15-17
Conclusion	17
Certificate of Service	18-19

TABLE OF AUTHORITIES

Cases

	Page
California v Ciraolo, 475 US 207 (1986)	9
Dow Chemical Company v United States, 476 US 227 (1986)	9
Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)	15
McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948)	14
United States v Dunn, 480 US 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)	17
United States v Ford, 34 F3d 992 (11th Cir. 1994)	9, 10, 11
United States v Ishmael, 834 F.Supp. 205 (E.D. Tex. 1994)	1
United States v Ishmael, --- F3d 3023 (5th Cir. 1995)	1, 2, 10, 11

	Page
United States v. Jeffers, 342 U S 48, 51, 96 L Ed 59, 64, 72 S Ct 93	15
United States v Myers, 46 F3d 668 (7th Cir. 1995)	9, 10, 11
United States v Pace, 955 F2d 270 (5th Cir. 1992)	16, 17
United States v Pinson, 24 F3d 1056 (8th Cir., 1994, cert.den. 115 S.Ct. 664)	9, 10, 11
United States vs Taborda, 635 F2d 131 (2nd Cir. 1980)	10
Washington v Young, 123 Wash.2d 173, 867 P.2d 593, (1994)	10, 12

Statutes

18 USC §924(c)(1)	4, 7
18 USC §1952(a)(3)	4, 7
18 USC §3231	2, 7
18 USC §3731	3, 8
21 USC §841(a)(1)	3, 7

	Page
21 USC §849	3, 7
21 USC §853	4, 7
28 USC §1254	2, 3

Rules

Rule 41(c)(1) of the Federal Rules of Criminal Procedure	4

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

ROHN MARTIN ISHMAEL	§	
AND	§	
DEBRA K. ISHMAEL	§	
Petitioners	§	
	§	
V	§	NO. _____
	§	
THE UNITED STATES	§	
OF AMERICA	§	
Respondent	§	

♦ ♦ ♦ ♦ ♦

DEBRA K. ISHMAEL'S
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

♦ ♦ ♦ ♦ ♦

1. REPORTS OF OPINIONS DELIVERED IN THIS CASE

1.1 United States v Ishmael, 834 F.Supp. 205 (E.D. Tex. 1994). (Appendix, pp. 53-87).

1.2 United States v Ishmael, Opinion of the United States Court of Appeals for the Fifth Circuit, March 15, 1995, United

States v Ishmael, --- F3d 3023 (5th Cir. 1995) (Appendix, pp. 88-121).

2. STATEMENT OF JURISDICTION

2.1 Judgment Sought To Be Reviewed: Judgment of the United States Court of Appeals for the Fifth Circuit, March 15, 1995 (Appendix, pp. 88-121), Suggestion of Rehearing En Banc denied April 19, 1995; Mandate Issued April 27, 1995.

2.2 Statutory Provision Conferring Jurisdiction on the Supreme Court of the United States: The United States Supreme Court has jurisdiction of this matter as provided in 28 USC §1254 (Appendix, p. 5).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

3.1 Jurisdictional Statutes

(A) United States District Court: 18 USC §3231 (See Appendix, p. 2 for text of statute).

(B) United States Courts of Appeal: 18 USC §3731 (See Appendix, pp. 3-4 for text of statute).

(C) United States Supreme Court: 28 USC §1254 (See Appendix, p. 5 for text of statute).

3.2 United States Constitution: Fourth Amendment to the United States Constitution (See 1, p. 1. for text of amendment).

3.3 Offense Statutes: On October 7, 1993, Debra K. Ishmael and Rohn Martin Ishmael were indicted by a United States Grand Jury for violations of:

(A) 21 USC §849 (Conspiracy to Possess with Intent to Distribute More than 100 Marihuana Plants) (See Appendix, pp. 34-35 for text of statute);

(B) 21 USC §841(a)(1) (Possession with Intent to Distribute Over 100 Pants

of Marihuana) (See Appendix, pp. 20-33 for text of statute);

(C) 18 USC §924(c)(1) (Using a Firearm During a Drug Trafficking Crime) (See Appendix, pp. 6-17 for text of statute);

(D) 18 USC §1952(a)(3) (Interstate Transportation in Aid of Racketeering Enterprises) (See Appendix, pp. 18-19 for text of statute); and

(E) Forfeiture under 21 USC §853. (See Appendix, pp. 36-46 for text of statute).

3.4 **Rules of Criminal Procedure**: Rule 41 of the Federal Rules of Criminal Procedure, Search and Seizure (See Appendix, pp. 47-52 for text of rule).

4. STATEMENT OF THE CASE

4.1 **Course of proceedings and disposition in courts below**: On December

2, 1993, the Defendants filed their respective Motions to Suppress Evidence. United States District Judge Robert M. Parker granted the Defendants' Motions to Suppress Evidence. The United States of America Appealed Judge Parker's Order to the United States Court of Appeals for the Fifth Circuit. By opinion dated March 15, 1995, the Court of Appeals held that Judge Parker improperly granted the motions and reversed and remanded to the District Court for further proceedings. Petitioner's Suggestion for Rehearing En Banc was denied April 19, 1995, and the Mandate was issued April 27, 1995.

4.2 Statement of Facts: On September 27, 1993, based on the information secured through records investigation, on-the-ground surveillance, and three searches involving forward

looking imaging devices (FLIR) (two from the air and one on the ground), TFO Paul Black swore out an affidavit which formed the basis of the Henry W. McKee, United States Magistrate Judge's finding of probable cause for a warrant to search Rohn and Debra Ishmael's property near Cushing, Nacogdoches County, Texas. That search warrant, which authorized the seizure of property belonging to the Ishmaels, was executed on September 29, 1993. The resulting search revealed a marijuana growing operation in the basement of the metal building, and Rohn and Debra Ishmael were arrested on that date. On October 6, 1993, a Federal Grand Jury for the Eastern District of Texas indicted Rohn and Debra Ishmael in a six-count indictment charging them with the offenses listed above.

5. JURISDICTION OF THE COURTS BELOW

5.1 Jurisdiction of District Court: The United States District Court has jurisdiction of this matter as provided in 18 USC §3231 (Appendix, p. 2). On October 7, 1993, Debra K. Ishmael and Rohn Martin Ishmael were indicted by a United States Grand Jury for violations of 21 USC §849 (Conspiracy to Possess with Intent to Distribute More than 100 Marihuana Plants) (Appendix, p. 34-35); 21 USC §841(a)(1) (Possession with Intent to Distribute Over 100 Pants of Marihuana) (Appendix, pp. 20-33); 18 USC §924(c)(1) (Using a Firearm During a Drug Trafficking Crime) (Appendix, pp. 6-17); 18 USC §1952(a)(3) (Interstate Transportation in Aid of Racketeering Enterprises) Appendix, pp. 18-19); and Forfeiture under 21 USC §853 (Appendix, pp. 36-46).

5.2 **Jurisdiction of the Fifth Circuit Court of Appeals**: On February 14, 1994, the United States of America filed its formal Notice of Appeal and perfected its appeal to the United States Court of Appeals for the Fifth Circuit, citing in its brief 18 USC §3731 (Appendix, p. 3-4) as jurisdictional grounds for the appeal.

6. REASONS WRIT OF CERTIORARI SHOULD BE GRANTED

Writ of Certiorari should be granted by this court to resolve the following serious constitutional issues:

6.1 Is a warrantless thermal imaging device (FLIR) search constitutionally proscribed?

With each new technological innovation, we move closer and closer to allowing the warrantless use of advance technology to invade the privacy of American homes and businesses. We move closer and closer to allowing the kind of

aerial surveillance using sophisticated electronic equipment about which this Court warned in Dow Chemical Company v United States, 476 US 227 (1986), and we move further and further away from the "naked eye" surveillance approved by the Supreme Court in California v Ciraolo, 475 US 207 (1986).

Recently, there have been several decisions from United States Courts of Appeals, in addition to the Ishmael case, holding that warrantless use of thermal imaging devices (FLIR) does not violate Fourth Amendment protection, (cf United States v Ford, 34 F3d 992 (11th Cir. 1994); United States v Myers, 46 F3d 668 (7th Cir. 1995), and the United States Supreme Court has denied certiorari in United States v Pinson, 24 F3d 1056 (8th

Cir., 1994, cert.den. 115 S.Ct. 664), which address the same issue.

During this same time frame, at least one state court of final resort has made an opposite ruling. (cf Washington v Young, 123 Wash.2d 173, 867 P.2d 593, (1994).

Ford, Myers, Pinson, and Ishmael all emphasize the non-intrusive character of a warrantless thermal imaging device (FLIR) search. These rulings ignore long-standing guidelines such as those provided by the Second Circuit Court of Appeals in United States vs Taborda, 635 F2d 131 (2nd Cir. 1980) regarding the Government agent's use of a sophisticated telescope to view illegal activities. The Court held that unenhanced visual observations made by DEA agents from across the street from defendant's apartment were not

"searches" within Fourth Amendment. However, to the extent that agents used a telescope to identify objects or activities that could not be identified without it, those observations were "searches" and, in absence of a search warrant, the information gathered from such observations could not form the basis for issuance of a search warrant. Like high-powered telescopes, searches using thermal imaging (FLIR) adds one more battalion to the army that marches to assault the precious privacy rights of Americans. FLIR is enhanced surveillance, and certainly does not fit into the category of matters observable with the naked eye.

Further, the Courts in Ford, Myers, Pinson and Ishmael cases, in applying a Katz analysis, found that the owners of

the subject property did not have any subjective expectation of privacy in heat emitting from their home or business, that society is willing to recognize as reasonable.

The use of FLIR allows government agents to draw specific inferences about the inside of a home or business, thus disclosing information about activities occurring within the confines of the home or business. Is not a person entitled to keep such activity from disclosure absent a warrant?

The Supreme Court of Washington in the Washington v Young case recognized

> ...as technology races ahead with ever increasing speed, our subjective expectation of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent.

That Court went on to say:

> We believe our right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.

This Court is being asked to make that thoughtful and purposeful choice.

What society is willing to recognize as a subjectively reasonable expectation of privacy surely must include a factor of society's awareness of technological advances available to the government that can be used to determine activities in homes and businesses. Is society willing to accept, once aware of the ever-advancing technology, that it is permissible for government agents, without a warrant, to fly over their homes and businesses and use a highly sophisticated and complex instrument that allows photography of things the human eye cannot see?

When the member of this Court are deciding whether or not to grant this petition, it would certainly seem appropriate to be reminded of the strong and wise admonitions given by their predecessors in the two cases that follows:

In McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), the Court stated,

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows

> that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. (emphasis added).

335 U.S. at 455-56, 69 S.Ct. at 193-94.

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), is to similar effect:

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U S 48, 51, 96 L Ed 59, 64, 72 S Ct 93 [95], and that **searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment--** subject only to a few specifically established and well-delineated exceptions. (emphasis added)

6.2 Does a business curtilage lose its Fourth Amendment protection because it is located in an "open field" adjacent to a home?

In its opinion in this case, the Court of Appeals held that the warrantless use of a thermal imager (FLIR) to enhance officers' observations of steel building located in an "open field" does not violate the Fourth Amendment (Appendix, p. 101). At the same time, however, the Court of Appeals accepted the District Court's characterization of the steel building as a business curtilage, but took away its Fourth Amendment protection because it was in an "open field" adjacent to a home. (Appendix, p. 115). To say that the government can conduct warrantless searches of a business curtilage simply because it was outside the curtilage of a home eviscerates the Fourth Amendment. The Court of Appeals did say that, and cited United States v Pace, 955 F2d 270 (5th Cir. 1992) and

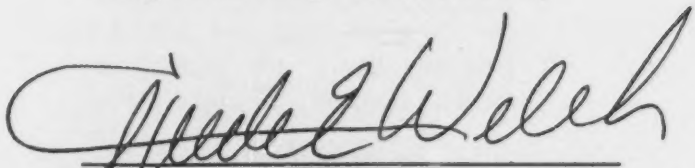
United States v Dunn, 480 US 294, 303-305, 107 S.Ct. 1134, 1140-42, 94 LEd2d 326 (1987), both of which held that "...there is no business curtilage surrounding a barn lying within an open field".

The point should be obvious. The terms "business curtilage" and "open field" are mutually exclusive terms, unlike the non-business curtilage barn discussed in Pace and Dunn.

6.3 **Conclusion**: Petitioner Debra K. Ishmael submits that the state of the law with regard to warrantless searches utilizing thermal imaging devices (FLIR) is not well defined, especially in light of the conflict in the opinion of the Court of Appeals in this case, as discussed in 6.2 above, and Certiorari

should be granted to clarify these important constitutional issues.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari of Debra K. Ishmael has been sent to the following named attorneys of record by Certified Mail, Return Receipt Requested, postage prepaid, on June 10, 1995:

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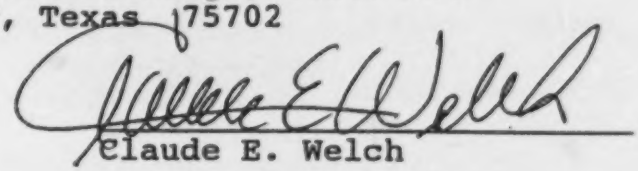

Claude E. Welch

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APPENDIX TO DEBRA K. ISHMAEL'S PETITION FOR WRIT OF CERTIORARI

♦ ♦ ♦ ♦ ♦

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123pp

TABLE OF CONTENTS

	Page
Constitution	
Constitution of the United States, Amendment IV--Search and Seizures	1
Jurisdictional Statutes	
18 USC §3231	2
18 USC §3731	3-4
28 USC §1254	5
Offense Statutes	
18 USC §924(c)(1)	6-17
18 USC §1952(a)(3)	18-19
21 USC §841(a)(1)	20-33
21 USC §849	34-35
21 USC §853	36-46
Rules	
Rule 41, Federal Rules of Criminal Procedure	47-52
Orders	
Corrected Order on Defendants' Motions to Suppress	53-87
Judgment of the United States Court of Appeals for the Fifth Circuit	88-121

CONST Amend. IV, Searches and Seizures
UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
AMENDMENT IV--SEARCHES AND SEIZURES
Current through P.L. 103-465, approved 12-8-94

Amendment IV. Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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18 USCA Sec. 3231
UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 211--JURISDICTION AND VENUE
Current through P.L. 103-465, approved 12-8-94

Sec. 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

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18 USCA Sec. 3731
UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 235--APPEAL

Current through P.L. 103-465, approved 12-8-94

Sec. 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

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28 USCA Sec. 1254
UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT
Current through P.L. 103-465, approved 12-8-94

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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18 USCA Sec. 924
UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 44--FIREARMS
Current through P.L. 103-465, approved 12-8-94

Sec. 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(5)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun

or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled

Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(1), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable,

extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of

the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States

which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or

carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, trans-

fers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(i) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(j) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3), smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(k) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(n) A person who conspires to commit an offense under subsection (c) shall be

imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

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18 USCA Sec. 1952
UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 95--RACKETEERING
Current through P.L. 103-465, approved 12-8-94

Sec. 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform--

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been

paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

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21 USCA Sec. 841
UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES
Current through P.L. 103-251, approved 5-16-94

Sec. 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives

of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detect-

able amount of methamphetamine, its salts, isomers, or salts of its isomers;
such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relat-

ing to narcotic drugs, marijuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4--piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results

from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under

this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall,

in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant sub-

stances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of

Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who vio-

lates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(c) Repealed. Pub.L. 98-473, Title II, Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20

years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under

Title 18, or imprisoned not more than one year, or both.

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21 USCA Sec. 849
UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES
Current through P.L. 103-465, approved 12-8-94

Sec. 849. Transportation safety offenses

(a) Definitions

In this section--

"safety rest area" means a roadside facility with parking facilities for the rest or other needs of motorists.

"truck stop" means a facility (including any parking lot appurtenant thereto) that--

(A) has the capacity to provide fuel or service, or both, to any commercial motor vehicle (as defined in section 31301 of Title 49), operating in commerce (as defined in that section); and

(B) is located within 2,500 feet of the National System of Interstate and Defense Highways or the Federal-Aid Primary System.

(b) First offense

A person who violates section 841(a)(1) of this title or section 856 of this title by distributing or possessing with intent to distribute a controlled substance in or on, or within 1,000 feet of, a truck stop or safety rest area is (except as provided in subsection (b)) [FN1] subject to--

(1) twice the maximum punishment authorized by section 841(b) of this title; and

(2) twice any term of supervised release authorized by section 841(b) of this title for a first offense.

(c) Subsequent offense

A person who violates section 841(a)(1) of this title or section 856 of this title by distributing or possessing with intent to distribute a controlled substance in or on, or within 1,000 feet of, a truck stop or a safety rest area after a prior conviction or convictions under subsection (a) of this section have become final is subject to--

(1) 3 times the maximum punishment authorized by section 841(b) of this title; and

(2) 3 times any term of supervised release authorized by section 841(b) of this title for a first offense.

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21 USCA Sec. 853
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TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES
Current through P.L. 103-465, approved 12-8-94

Sec. 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an in-

terest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered con-

sents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, apprais-

ers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an inter-

est in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions

under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held

within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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FRCRP Rule 41
STATES CODE ANNOTATED
RULES OF CRIMINAL PROCEDURE
FOR THE UNITED STATES DISTRICT COURTS
IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS
Amendments received to 1-1-95

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

(b) Property or Persons Which May Be Seized with a Warrant.--A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivi-

sion shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.

(2) Warrant Upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.

(E) Contents.--The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution.--The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded.--Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make

it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the

property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
V	§	NO. 9:93CR22
	§	
ROHN MARTIN ISHMAEL	§	
DEBRA K. ISHMAEL	§	

CORRECTED ORDER ON
DEFENDANT'S MOTIONS TO SUPPRESS

On December 16, 1993, the Motions to Suppress Evidence filed by Defendants Rohn Martin Ishmael and Debra K. Ishmael came on for hearing. The motions allege identical grounds for suppression and will be treated a single motion.

The question before the Court concerns the limitation, if any, on the Government's ability to use thermal imaging devices to detect concealed underground illegal activity. The issue was spawned by the tension created between the right to privacy on the one hand and our

society's rapidly evolving technological sophistication on the other. Left unchecked, technology has the potential to restrict, as a practical matter, the right to privacy to the confines of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2nd 147 (1973). We must take care that the war on drugs not count as one of its victims fundamental rights. The benefits to our society of safeguarding the right to privacy is such that the courts must say that there is a limit to the use of technological weapons, even in the war on drugs.

FACTS

In late summer of 1992, Drug Enforcement Administration (DEA) Task Force Officer (TFO) Paul Black received information that a confidential witness had delivered large quantities of concrete remix to

Defendant Rohn Ishmael at a secluded wooded rural location in Nacogdoches County, Texas and had been paid in cash. The witness had observed that Defendant was mixing the concrete remix himself and driving to a deep ravine in another area on the property where a construction project was underway. The witness also observed that Rohn Ishmael appeared nervous or suspicious and did not want anyone to go down to the construction site. Black and another TFO entered the property in September of 1992 and conducted surveillance, which revealed two mobile homes, some large plastic tanks, and a goose neck trailer containing numerous sections of PVC pipe, but no illegal activity.

About a year later, on August 9, 1993, TFO Black and three other law enforcement officers went back to the prop-

erty. On this trip the officers followed a roughly built road from the mobile home at the front of the property to a large dug out next to a two acre pond. There they saw a small quantity of remix, a dump truck and a concrete mixer that had been parked in the dug out with weeds growing up around them.

The next day, TFO Black determined, based on various computerized data banks, that Rohn Ishmael's criminal history included possession, distribution, and growing of marijuana. Black also determined that the property under surveillance was part of a 130 acre tract, which Rohn and Debra Ishmael purchased in 1991.

On August 13, 1993, law enforcement officers flew over the property and took numerous photographs. These photographs show a mobile home near the road frontage

and a large steel building (40' x 80' x 15') about 200-300 yards behind the mobile home, next to the two acre pond. Also four large tanks and numerous vehicles and trailers observed.

Surveillance officers entered the property on August 18, 1993 and again on August 19, 1993. On these trips they observed an exhaust fan near the top of the building running continuously, and a water pump and pipes running from the pond to the building at an angle that the officers believed would allow the pipes to enter the building approximately ten feet below the foundation. TFO Black concluded that Ishmael had built a basement under the building which would account for the large amount of concrete he purchased in excess of that required to build a six inch slab under the building.

On August 19, 1993, at 4:00 a.m., law enforcement officers flew over the property at approximately 1000 - 1500 feet in a helicopter equipped with a thermal imager, referred to as a Forward Looking Infra Red Device (FLIR). The device records in visual images the differences in temperature on the surfaces of objects. The video tape made during the flyover shows that the metal building and a nearby brush pile were considerably hotter than the surrounding woods.

On September 16, 1993, law enforcement agents again entered the property, this time with a handheld thermal imager. The tape made also shows that the metal building and the brush pile were hotter than the surrounding area. The officers observed pressurized water flowing from the building into the pond on this trip.

TFO Black compiled a list of purchases and phone calls made by Rohn Ishmael which indicated that he had made extensive purchases of construction equipment and supplies, electrical supplies, and farm and garden supplies during 1991-1993. Black also submitted electrical use records for the mobile home and the metal building that showed increased use of electricity beginning in June 1993 in both structures. Electrical usage in the building exceeded that in the household usage in August. Black's investigation revealed that the Rohn Ishmael's business, R&M Equipment Rental, did not have a local telephone listing. Officers that had entered the property to conduct surveillance on seven different occasions (some of which were at night) had not seen any signs, vehicle traffic or people around

the building, from which they concluded that the building was not the site of a legitimate business operation.

Based on the above information, TFO Black swore out an affidavit which formed the basis of the magistrate's finding of probable cause for a warrant to search Rohn and Debra Ishmael's property. That search warrant was executed on September 29, 1993, and revealed a marijuana growing operation in the basement of the metal building. The defendants have not moved to suppress all the items seized in the search, which include, among other things, 770 marijuana plants and some fire arms.

BURDEN OF PROOF

The movants must first establish a reasonable expectation of privacy and that the search and seizure took place without a search warrant. Then the burden of

proof shifts to the government to establish that an exception to the search warrant requirement was applicable and that the search and seizure was, in fact, a reasonable one. *United States v. Bachner*, 706 F.2nd 1121, 1126 (11th Cir. 1983); *United States v. Harris*, 479 F.2nd 508, 509 (5th Cir. 1973).

In this case, the challenged thermal imaging tapes must first be analyzed to determine whether Defendants' Fourth Amendment rights were violated. If they were, the Court will then determine whether the warrant and the resulting search can survive without the information gathered with the thermal imaging devices.

THERMAL IMAGING

The alleged probable cause for the search warrant was obtained by utilizing thermal imaging equipment which detected

heat from the Defendant's buildings and property without a search warrant.

A. Defendants' Burden

Defendants begin by asserting that they had a reasonable expectation of privacy in the metal building, and in their property surrounding the metal building. *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507,516, 19 L.Ed.2nd 576 (1967) sets out a two part inquiry to determine whether there is a constitutionally protected expectation of privacy in a particular area. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? The Court finds that the defendants did manifest such an expectation, by locating the building on a piece of secluded wooded rural property, in a deep ravine, out of sight of the nearby county

road. Further, the affidavit noted that Rohn Ishmael bought and mixed and transported his own concrete, and constructed the basement and slab at a higher cost than a local contractor would have charged, so that others would not know about the basement under the building.

The second inquiry is whether society is willing to recognize that expectation as reasonable. The test of legitimacy is not whether the individual chooses to conceal his activity, but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourteenth Amendment." *Oliver v. United States*, 466 U.S. 170, 181-183, 104 S.Ct. 1735, 1742-1744, 80 L.Ed.2d 214 (1984).

Defendants argue that the area in and around the building is within the curti-

lage of their home. Although it is well established that an individual has a reasonable expectation of privacy in the curtilage of his home, there are no bright lines that determine where the curtilage of a home ends. The Supreme Court has enumerated four factors that the Court should consider in drawing the parameters of a claimed curtilage. *United States v. Dunn*, 480 U.S. 294, 170 S.Ct. 1913, 94 L.Ed.2d 326 (1987). First, the Court must consider the proximity of the area to the home. Here, the metal building was about 200-300 yards from the mobile home. Second, the building was not within an enclosure surrounding the home, nor was there an enclosure around the mobile home that excluded the building. Third, the nature and uses to which the area is put must be considered. Evidence established that

about one quarter of the interior area of the building was carpeted, equipped with a bathroom and a water heater, a refrigerator, exercise equipment, telephone and furnished as an office. Finally, considering the fourth factor, the Ishmael's went to great lengths to conceal the metal building from observation by passersby, to the extent that a person would have to trespass on or fly over secluded private property, with road frontage limited to an unpaved county road, to even be aware that the building existed.

The government, on the other hand, argues that the area immediately surrounding the building should be characterized for Fourth Amendment purposes as an "open field." To fall within the "open fields" doctrine the area "need be neither 'open' nor a 'field' as those terms are used in

common speech." *Oliver v. United States*, 466 U.S. 170, 180, n.11, 104 S.Ct. 1735, n.11. 68 L.Ed.2d 214 (1984). Rather, the "open fields" doctrine refers to the unoccupied or undeveloped area outside of the curtilage that does not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference or surveillance. *Oliver*, 466 U.S. at 179, 104 S.Ct. at 1741.

Although the building has some characteristics of home curtilage, the Court finds that it was not in the curtilage of the Ishmael's home. Further, to say that the government could intrude up to the very windows of the building on the basis of the "open fields" doctrine simply because it was outside the curtilage of a home, would eviscerate the Fourth Amend-

ment. Rather, the Court finds the most accurate characterization of the property in question is that of a business. According to the affidavit of TFO Black, Rohn Ishmael was the proprietor of a business named R&M Equipment Rental, duly registered with the Texas State Comptroller's Office, located at Route 1, Box 180-B, Cushing, Texas (the address if the Ishmael's rural property). The affidavit also indicates that Ishmael make various purchases of commercial equipment under that business name during the time period that he was the target of TFO Black's investigation and that he discussed the electrical usage needs of his business with a utility company representative. Finally, the affidavit establishes that the metal building, equipped with an office and what appears to be a warehouse

space, and the private property surrounding the building was not open to the public. The Fourth Amendment's ban on warrantless searches shields places of business as well as residences. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct.1816, 56 L.Ed.2d 305 (1978). A business proprietor is free to choose what areas of his business he opens to the public. What is observable to the public, is observable by the Government without a warrant. *Id.* 436 U.S. at 315, 98 S.Ct. 1822. The Court finds, based on the observation of law enforcement officials contained in the affidavit, that the Ishmaels did not invite or allow the public onto the business premises in question.

The fact that the officers in this case observed only the exterior of the building prior to obtaining the warrant

brings us to the question of whether a business premise has curtilage. While the term curtilage originally referred to that area protected by the sanctity of a home, *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the term "business curtilage" is now used by some courts to define the area around a business protected by the Fourth Amendment. See, e.g. *United States v. Swart*, 679 F.2d 698 (7th Cir. 1982). Regardless of whether the term business curtilage is appropriate, the analysis must be bottomed on the reasonableness of defendants' expectation of privacy. The fact that the officers trespassed on the Ishmael's private land, by itself, has "little or no relevance to the application of the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 184-84, 104 S.Ct. 1735, 1744, 80

L.Ed.2d 214 (1984). This is so because the law of trespass extends to areas which are not protected by the Fourth Amendment. *Id.* The facts of this case compel the Court to find that while the officers repeated trespass on some parts of the 130 acre tract would not have offended the Fourth Amendment, the Ishmaels had a reasonable expectation that their effects, associated with the secreted metal building and the business being conducted there, were safe from Governmental surveillance. This protection logically include the water and air systems connected to the building, and the vehicles parked around the building.

There is language in the affidavit concluding that R&M Equipment Rental was not legitimate business, meaning, I presume, that the Ishmaels did derive busi-

ness revenues from renting equipment, but rather from the cultivation of marijuana. There is no authority for, and no logic in, creating an exception to the warrant requirement because law enforcement officials believe that a particular business is engaged in illegal activity.

The thermal readings made during flyovers require yet another layer of analysis. The Fourth Amendment is not violated by naked-eye aerial observations of property, even if the property is within the curtilage of a home. *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L.Ed.2d 210 (1986). In *Ciraolo*, the police received an anonymous telephone tip that marijuana was growing in a suburban backyard, which was enclosed by two fences and shielded from view at ground level. The police secured a private airplane and

flew over the yard at an altitude of 1,000 feet, within navigable airspace. During the overflight, the officers readily identified marijuana plants 8 feet to 10 feet high, growing in the backyard with their "naked eyes". The Supreme Court began its analysis by noting that the Fourth Amendment had never required law enforcement officers to shield their eyes when passing a home on a public thoroughfare. Police, like any member of the public, could have glanced down during a flight within public navigable airspace and seen the Ciraolo marijuana with their naked eyes. Therefore, the homeowner could not reasonably expect privacy from aerial observation with his curtilage.

A variation on the overflight observation question was presented to the Supreme Court in *Florida v. Riley*, 488 U.S.

445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989). In that case, criminal defendant Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10-20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were not visible from any vantage point on surrounding property. The greenhouse was covered with roofing panels, but at the time of the overflight, two of the panels, amounting to approximately 10% if the roof area, were missing. Like *Ciraolo*, law enforcement officials received an anonymous tip that marijuana was being grown on the property. After determining that the contents of the greenhouse could not be seen from the road, an officer flew over the property in

a helicopter at the height of 400 feet. The officer was able to identify marijuana growing in the greenhouse through the hole in the roof with his naked eyes. A plurality of the Supreme Court held that because the helicopter was flying within the legal altitude for helicopters (although lower than that for fixed aircraft) and the marijuana was discernible to the naked eye from that height, Riley had no reasonable expectation of privacy from such observation. Justice O'Conner concurred that the observation passed Fourth Amendment muster, but stated,

> In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient

> regularity that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.'" (citing *Katz, supra*, 389 U.S., at 361, 88 S.Ct. at 516.) *Florida v. Riley*, 488 U.S. at 454, 109 S.Ct. at 699.

These Fourth Amendment flyover cases inform this Court's decision in two ways. First, the Defendants have not carried their burden in establishing either that the flights over their property violated FAA regulations regarding altitudes and flight paths, or that the flights were below the altitude which members of the public travel with sufficient regularity to negate a reasonable expectation of privacy. It follows that the naked eye observations and photographs taken with standard camera during the flights are not excludable on Fourth Amendment grounds. Second, the holdings in both cases are

explicitly limited to naked eye observations, and do not sanction recording thermal images from otherwise legal flights without a search warrant.

Based on the conclusions that 1) the defendants demonstrated a subjective expectation of privacy, 2) that the property in question is a business premises, not open to the public, and 3) that the thermal images were not the product of naked eye aerial observation, the Court finds that the Defendants had a reasonable expectation of privacy in the building and the surrounding property.

The Government conceded at the hearing that both the flyover and the handheld thermal imagery tapes were the product of earlier searches. The argument cannot be logically made, and the Government has not attempted to argue, that the use of ther-

mal imaging equipment to make tapes of the heat differential on Defendants' property was not a search. Likewise, there is no contention that the Government had a search warrant prior to conducting these searches. The Defendants have therefore carried their burden of establishing a warrantless search of property in which they had a reasonable expectation of privacy.

B. Government's Burden

The burden has now shifted to the Government to establish that the thermal imaging searches fall within a exception to the warrant requirement, and were reasonable.

The Government first relies on its contention that the heat was in plain view. The thermal imaging tape made by equipment attached to a helicopter is

analogize to the photographs taken by the mapmaking camera in *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). In that case, Dow Chemical Company challenged the aerial surveillance and photography of its industrial complex by the Environmental Protection Agency on Fourth Amendment grounds. The Supreme Court began by reciting the rule that the public and the police may lawfully survey private property from the air. Although the photographs taken by the Government in *Dow Chemical* revealed slightly more detail than available to the naked human eye, the Supreme Court found that they did not give rise to constitutional problems. The Court specifically noted, however, that surveillance of private property using highly sophisticated surveillance equipment might

be constitutionally proscribed absent a warrant. The Court finds that the thermal imaging equipment used by the government in this case was exactly the type of sophisticated technology that concerned the Supreme Court, and was therefore excepted from the *Dow* opinion's approval for warrantless searches. The thermal imaging tapes made by officers trespassing on private land using hand held equipment offend the Fourth Amendment for the same reason. Put most simply, the thermal images recorded by this technology were not in plain view from the aircraft or the ground.

The government next argues that the thermal imaging equipment is nonintrusive and detects only heat that is emitted into the atmosphere, and therefore abandoned. In *United States v. Penny-Feeney*, 773

F.Supp. 220 (D. Haw. 1991),[1] police, in an attempt to corroborate a tip that the defendant's residence housed an indoor marijuana growing operation, flew over the defendant's house using a thermal imager. The images of the house and garage revealed heat radiating from the garage roof, garage door and joint between the garage and the house in an amount disproportionate to that coming from surrounding buildings. The officers concluded that the images were consistent with heat generated by artificial lights used to grow marijuana indoors, and relied on the thermal imagery results to establish probable cause for a subsequent search. The court

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[1]*The Ninth Circuit affirmed the district court's denial of the defendant's motion to suppress, finding that the Hawaii State Police demonstrated probable cause for the search independent of the thermal imagery readings, and so did not reach the issue before the Court in the present case.* United States v. Feeney, *984 F.2d 1053 (9th Cir. 1993).*

held that by venting the heat outside using exhaust fans, the defendant had abandoned the heat. The court compared the vented heat to garbage left for collection outside of a home, and relying on *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1987), found that the defendant had no reasonable expectation of privacy in such "waste heat."

I am not persuaded that heat escaping from a building is the same as abandoned garbage. If the government has the right to repeatedly trespass, conduct visual searches from nearby open fields not protected as curtilage, and make frequent flyovers using FLIR and other advanced technology, all without a warrant, there is precious little left of the right to privacy. The Ishmaels went to great lengths to conceal their underground ac-

tivity from human sensory detection. If a law enforcement agent had alleged in an affidavit that while conducting surveillance he felt an inordinate amount of heat being vented from the building, the waste heat analogy may have validity. However, to use high tech sensory devices to detect such heat creates a situation inapposite to abandoned garbage. The Court therefore rejects the Government's argument that the defendants abandoned their expectation for privacy by "allowing" the heat to radiate from the building and the air exhaust duct.

Finally, the Government argued that the use of thermal imaging is like using a dog to sniff for illegal drugs. The Supreme Court has held that using a drug detection dog to sniff luggage at an airport is not a search within the meaning of

the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), states:

> A "canine sniff" by a well trained narcotics detection dog ...does not expose noncontraband items that would otherwise remain hidden from public view, as does, for example, as officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a physical search. Moreover the sniff only discloses the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed to the discriminate and more intrusive investigation method. *Id.* at 462 U.S. 707.

The comparison of dog sniffs and FLIRs fails on two levels. First, the thermal imager cannot distinguish between

"contraband heat" and "legal heat," so that the information garnered from such a technique is less limited, and thus results in more intrusion than a dog sniff. Second, a dog's sense of smell, while more acute than a human's, does not compare to a technology that can turn minute graduations in temperature into video tapes from 1500 feet away.

The Court finds that the Government has not met its burden of establishing an exception to the warrant requirement of the Fourth Amendment for thermal imaging devices. Consequently, the evidence gathered from the Ishmaels' property by use of such devices must be excluded from consideration when determining probable cause in this case.

WAS THERE PROBABLE CAUSE ABSENT THE THERMAL IMAGERY EVIDENCE?

The evidence remaining, absent the information gathered by the thermal imagery equipment, does not amount to probable cause to support the issuance of a search warrant. The Ishmaels built a building with a basement, and purchased various pieces of electrical and agricultural equipment. They were secretive and Rohn Ishmael had a criminal history involving violation of marijuana laws. But, there were no reports of law enforcement officers or informants who had observed any marijuana or any other illegal activity by the Ishmaels. The evidence of their activity was consistent with developing a new patented strain of African Violets, and innumerable other perfectly legal activities.

Probable cause is established if the facts would lead a reasonable judge to

Probable cause is established if the facts would lead a reasonable judge to believe the evidence sought will be found in the particularly described location. The issuing magistrate must evaluate the facts under the "totality of the circumstances" test. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The Court finds that, absent the thermal imagery information, the magistrate would not have had a "substantial basis" for conducting that the affidavit established probable cause in this case. *See, id.* at 236 103 S.Ct. at 2331.

CONCLUSION

It is therefore ORDERED that Defendants' Motion to Suppress are GRANTED. The Government will not be allowed to introduce evidence resulting from the

Signed the 11th day of February, 1994.

s/Robert M. Parker, Chief Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40159

UNITED STATES OF AMERICA
Plaintiff-Appellant

VERSUS

ROHN MARTIN ISHMAEL AND
DEBRA K. ISHMAEL
Defendants-Appellees

Appeals from the United States District Court for the Eastern District of Texas

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Filed: March 15, 1995
Issued as Mandate: April 27, 1995

Before R. GARZA, DeMOSS, and BENAVIDES, Circuit Judges

DeMOSS, Circuit Judge:

Based on the readings from a thermal imager, along with other circumstantial evidence, federal law enforcement officers obtained a warrant to search the premises of Rohn Martin Ishmael and his wife, Debra

K. Ishmael. The officers executed the warrant and discovered some firearms and 770 marijuana plants. After being indicted, the Ishmaels moved to suppress the evidence on the ground that the warrantless use of the thermal imager was a constitutionally proscribed search. The district court granted the Ishmael's motion to suppress. We now reverse.

I.

The warrant in this case was based upon the following information: In the late summer of 1992, a confidential source informed Paul Black, a Drug Enforcement Administration ("DEA") officer, that he/she had delivered numerous truck loads of concrete re-mix to the Ishmaels' secluded, rural property in Nacogdoches County, Texas. The Ishmaels, according to the source, took inordinate measures to

conceal the need for the concrete. Rohn Ishmael, for example, would manually mix the concrete near the source's truck and then drive the concrete to another location on the property. His suspicions aroused, Black entered the property and saw two mobile homes and a trailer. Black, however, did not witness any illegal activity.

In August 1993, Black resumed his investigation. He and three other officers returned to the property and followed a roughly built road from the front of the property to a steep embankment where a large hole had been made. They observed around 60 empty bags of cement, a dump truck and a concrete re-mixer parked near the hole. The next day, Black investigated Rohn Ishmael's criminal record and found at least four separate marijuana-

related incidents dating back to 1974, several of which involved the cultivation of marijuana. Black, along with other DEA officers, then surveyed the Ishmaels' property by air. They observed a mobile home and a large steel building, separated by about 200 to 300 yards. The steel building stood next to a 2-acre pond. Black entered the property on foot two more times. He discovered that the Ishmaels had built a structure beneath the steel building. The substructure was wired for electricity and was being fed water from the nearby pond by way of exposed rubber tubes and a water pump. The substructure also had an exhaust fan, which Black noticed was continuously running. Black also observed a nearby pallet containing 100 5-gallon plastic buckets.

Suspecting that the Ishmaels were cultivating marijuana in the structure beneath the steel building, the DEA boarded a helicopter with a thermal imager and flew over the Ishmaels' property at approximately 500 to 1000 feet. A thermal imager detects differences through a viewfinder in varying shades of white and gray. In other words, the warm object will appear white on the device's viewfinder, whereas a cool object will appear gray. The device can record its readings on a standard videocassette. The DEA's recording of the Ishmaels' property showed that, although the water entering the substructure was noticeably cool, the water exiting it was emitting a substantial amount of heat. The recording additionally showed that the ground adjacent

to the substructure was much warmer than the ground further from the substructure.

Black then subpoenaed the Ishmaels' telephone records. The records indicated that the Ishmaels had made numerous calls to various horticulture shops, two of which appeared on a narcotics intelligence computer base as suppliers for other marijuana cultivators. Black also subpoenaed the Ishmaels' electrical utility records. The records showed that the substructure's power usage was extremely high and far exceeded the mobile home's power usage.

In September 1993, Black and several other officers again entered the Ishmaels' property on foot. Using a hand-held thermal imager, the officers canvassed the perimeter of the steel building but never entered it. The Officers made essentially the same findings; an unusual amount of

heat was emanating from the substructure and the ground adjacent to it. Black displayed his recordings to two DEA thermographers, both of whom concluded that the Ishmaels were illegally cultivating marijuana in the steel building's substructure. The DEA then used the thermal imager's readings, along with the wealth of information gathered by Black to obtain a warrant to search the steel building and its substructure on the Ishmaels' property. The officers executed the warrant two days later and uncovered 770 marijuana plants and several firearms. After being indicted in October 1993, the Ishmaels moved to suppress the evidence obtained pursuant to the search warrant. They argued that the readings from the thermal imager constituted an unconstitutional search and that, without those readings

the DEA did not have probable cause to obtain a warrant.

The district court granted the motion to suppress in January 1994. See United States v Ishmael, 843 F.Supp. 205 (E.D. Tex. 1994). The Court employed a burden-shifting analysis. The burden, it observed, initiated with the Ishmaels to demonstrate that they had a reasonable expectation of privacy. The Court concluded that, although the steel structure was outside the curtilage of the home, the Ishmaels nonetheless had exhibited a reasonable expectation of privacy. *id.* at 209-12. Specifically, it noted that "the Ishmaels had a reasonable expectation that their effects, associated with the secreted metal building and the business being conducted there, were safe from [g]overnment surveillance." *id.* at 211. Pointing

to Florida v Riley, 448 US 445 (1989), and California v Ciraolo, 476 US 207 (1986), the government argued that the Ishmaels did not have a reasonable expectation of privacy from the DEA's air surveillance. The Court rejected the government's argument, reasoning that those cases were limited exclusively to naked-eye observations. *id.* at 211-12.

According to the district court, the burden then shifted to the government to prove that its search fell within one of the several recognized expectations to the warrant requirement. The government, relying on Dow Chemical Company v United States, 476 US 227 (1986), argued below that the heat emissions were in "plain view." The court rejected the "plain view" argument on the ground that the heat emissions would not be in plain view with-

out the use of "sophisticated technology," namely the thermal imager. *id.* at 212. Alternatively, the government analogize the heat emissions to curb-side garbage (as in California v Greenwood, 486 US 35 [1988] and the scent of cocaine emanating from luggage as in United States v Place, 462 US 696 [1983]): because each has been effectively abandoned, the defendant no longer has a subjective expectation of privacy in its concealment. The court rejected the government's analogies on the ground that the relative sophistication of the thermal imager poses a greater intrusion than officers manually rummaging through abandoned garbage or a trained police dog alerting to a suitcase carrying contraband. *id.* at 212-213.

Having found that the use of the thermal imager constituted a search pro-

scribed by the Fourth Amendment, the court proceeded to determine whether the remaining evidence amounted to probable cause. The court noted that the DEA had no direct evidence of illegal activity taking place on the Ishmaels' property. *id.* at 213-14. The court stated, "The evidence of their activity was consistent with developing a new patented strain of African violets, and innumerable other perfectly legal activities." *id.* at 214. On this basis, the court concluded that a judge would not find that probable cause existed for issuing a warrant, and it therefore granted the Ishmaels' motion to suppress. The government now appeals the district court's holdings that the warrantless use of the thermal imager was unconstitutional and that, absent its readings, probable

cause did not exist for the issuance of the warrant.

II.

A.

In reviewing a district court's ruling on a motion to suppress, we review the court's conclusions of law de novo and its findings of fact for clear error. United States v Cardenas, 9 F3d 1139, 1147 (5th Cir. 1993); United States v Sanders, 994 F2d 200, 202-03 (5th Cir. 1993). Furthermore, we view the evidence in a light most favorable to the prevailing party, United States v Piaget, 915 F2d 138, 140 (5th Cir. 1990), which is this case is the Ishmaels.

B.

The warrantless use of thermal imagers by the police has spawned a fair amount of search and seizure jurisprudence

of the last several years.[1] Though the Fifth Circuit has yet to squarely address this issue[2] three of our sister circuits have, and each has concluded that such useis not a "search" proscribed by the Fourth Amendment. United States v Myers,

[1]*See United States v Myers, __F3d__, 1995 WL 38118 (7th Cir. 1995); United States v Robertson, 39 F3d 891 (8th Cir. 1994); United States v Kyllo, 37 F3d 526 (9th Cir. 1995); United States v Ford, 34 F3d 992 (11th Cir. 1994); United States v Pinson, 24 F3d 1056 (8th Cir. 1994); United States v Olson, 21 F3d 847 (8th Cir. 1994); United States v Deaner, 1 F3d 192 (3d 1993); United States v Fenny, 984 F2d 1053 (9th Cir. 1993); State v Young, 867 P2d 593 (Wash. 1994); United States v Field, 855 F.Supp. 1518 (W.D. Wis. 1994); United States v Domitrovich, 852 F.Supp. 1460 (E.D. Wash. 1994); United States v Porco, 842 F.Supp. 1393 (D. Wyo. 1994); United States v Deaner, 1992 WL 209966 (M.D. Pa. 1992); United Sates v Kyllo, 809 F.Supp. 787 (D. Or. 1992), vacated on other grounds, 37 F3d 526 (9th Cir. 1994); United States v Penny-Fenny, 773 F.Supp. 220 (D. Haw. 1991), aff'd on other grounds 984 F2d 1053 (9th Cir. 1993); See also Lisa J. Steele, Waste Heat and Garbage: The Legalization of Warrantless Infrared Searches, 29 Crim.L.Bull. 19 (1993).*

[2]*In United States v Broussard, 987 F2d 215 (5th Cir. 1993), the defendant moved to suppress certain evidence on the ground that the affidavit the government submitted in requesting a warrant was insufficiently detailed. In affirming the district court's denial of the motion, we noted that, to the extent that the affidavit was inadequate, the warrant was nonetheless valid because the government had supplied findings from a thermal imaging device. id. at 222. Because the defendant did not challenge the constitutionality of the warrantless use of the device, we did not address the issue. See also United States v Zimmer, 14 F3d 286, 288 (6th Cir. 1994)*

1995 WL 38118, at *2-*3 (7th Cir. 1995); United States v Ford, 34 F3d 992, 995-97 (11th Cir. 1995); United States v Pinson, 24 F3d 1056, 1058-59 (8th Cir. 1994). We now hold that the warrantless use of a thermal imager in an "open field" does not violate the Fourth Amendment.

1.

The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV. As in any Fourth Amendment surveillance case, our analysis begins with Katz v United States, 389 US 347 (1967). The Supreme Court in Katz enunciated its two-prong test for determining whether a warrantless search violated a defendant's legitimate expectation of

privacy: the defendant must have exhibited a subjective expectation of privacy, and that expectation must be one society is prepared to recognize as reasonable. *id.* at 361 (Harlan, J., concurring); see also Ciraolo,476 US at 212 (majority opinion). With regard to the first prong, the government maintains that the Ishmaels did not exhibit a subjective expectation of privacy because they made no effort to conceal the heat emanating from the building. If fact, the Ishmaels encouraged emissions of heat by installing an exhaust fan that operated continuously. Thus, the government argues, the Ishmaels clearly failed Katz' first prong because "[w]hat a person knowingly exposes to the public, even in his home or office is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. The Ishmaels, in

response, contend that the government's argument is somewhat specious; while the substructure admittedly was emitting heat, that emission was not a deliberate act. The law of physics, and not the Ishmaels' failure to contain, controlled the emissions of heat from the substructure. The Ishmaels argue that the government's "heat waste" analogy therefore is a bad one because one who expects his garbage to remain private can refrain from leaving it at the curb, whereas one who expects his heat waste to go undetected can only hope the police is not presently scanning his property with a thermal imager.

In cases involving very similar facts, other courts have readily accepted the heat waste analogy in concluding that the defendants have failed to satisfy Katz' first prong. See, e.g., Myers, ___

F3d at ____; Ford, 34 F3d at 995; Domitrovich, 852 F.Supp. at 1472-73; Penny-Fenny, 773 F.Supp. at 225-26. But a cursory review of Katz itself demonstrates that the first prong probably is not as restrictive as these courts have interpreted it to be. In Katz, the government, without a warrant, attached a recording device to the exterior of a telephone booth that the defendant used to illegally transmit gambling information. The defendant argued that the government's warrantless eavesdropping was proscribed by the Fourth Amendment, and the Supreme Court agreed. Though the defendant in Katz did not take every precaution against electronic eavesdropping, the Court nonetheless concluded that he had exhibited a subjective expectation of privacy. Katz, 389 US at 353 (the government's warrantless eavesdrop-

ping "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth") (majority opinion). Likewise, in Ciraolo, the defendant was cultivating marijuana in his backyard, which was enclosed by a six-foot outer fence and a ten-foot inner fence. Because the fences obstructed its view from ground level, the police flew over the defendant's property at 1,000 feet and observed themarijuana patch. Though it ultimately concluded that the search was constitutional, the Court initially concluded that the defendant "[c]learly...ha[d] met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits." Ciraolo, 476 US at 211; see also Riley, 488 US at 449 ("We recognize [in Ciraolo]

...that the occupant had a subjective expectation of privacy. We held, however, that such expectation was not reasonable.")[3]

Thus, unless we intend to render Katz' first prong meanginless, we must conclude that the Ishmaels exhibited a subjective expectation that their hydroponic laboratory would remain private. See Smith v Maryland, 442 US 735, 740 n.5 (1979) ("[s]ituations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of

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[3]*Riley is further proof that a dweller need not guard against every possibility of detection in order to satisfy Katz' first prong. The defendant in Riley was cultivating marijuana in a greenhouse that was missing several corrugated roofing panels. Flying over the greenhouse in a helicopter at 400 feet, the police observed marijuana through an opening in the roof. The Court found that the defendant "no doubt intended and expected that his greenhouse would not be open to public inspection." Riley, 448 US at 450. But concluding that Ciraolo was controling, the Court held that the search was nonetheless reasonable.*

Fourth Amendment protection").[4] though the Ishmaels did not -- indeed, could not -- take every precaution against the detection of the hydroponic laboratory, the balance of the evidence demonstrates that the Ishmaels exhibited a subjective expectation of privacy. Rohn Ishmael, for example, constructed the laboratory in great secrecy. In addition, it was built as a basement to a steel building that was not visible from a public road. We therefore conclude that the Ishmaels have satisfied Katz' first prong.

2.

We now must address whether the government's intrusion on the Ishmaels' sub

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[4]*See also 1 Wayne R. LaFave, Search and Seizure §2.1(c), at 308-310 (2d ed. 1987) (generally arguing that courts should avoid the contemplation of unreasonable hypotheticals when applying the first Katz prong); David H. Steinberg, Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard, 41 Duke L.J. 1508, 1516-20 (1992).*

jective expectation of privacy with a thermal imager is a reasonable one. Oliver v United States, 466 US 170, 182-83 (1984) ("the correct inquiry is whether the government's intrusion infringes upon the person and societal values protected by the Fourth Amendment"). It is at this point in the analysis that the use of technology, and its degree of sophistication, becomes an issue, because more sophisticated forms of technology increase the likelihood that their warrantless use will constitute an unreasonable intrusion. As the Supreme Court once stated, "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public...might be constitutionally proscribed absent a warrant." Dow Chemical, 476 US at 238.

Dow Chemical provides useful guidance for search and seizure cases involving surveillance technology. There, the Environmental Protection Agency, without a warrant, had flown over Dow's industrial plant with a precise mapping camera. Dow argued that the use of the camera was an unconstitutional search. The Supreme Court disagreed, reasoning that the government is not foreclosed from using technology to enhance its surveillances, provided that that technology does not reveal "intimate details." *id.* at 238. The Court was satisfied that the camera did not reveal such "details" because it was not "some unique sensory devise that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise,

commercial camera commonly used in mapmaking." *id.* at 283. Similarly, in United States v Knotts, 460 US 276 (1983), the police surveilled the defendant by means of an electronic beeper attached to the interior of a five-gallon chloroform drum. Relying on the beeper's signals, the police eventually uncovered the drum just outside the residence of one of the defendants. The defendant who owned the residence insisted that the warrantless use of the beeper was unconstitutional because it violated the sanctity of his home. The Supreme Court, however, held that the surveillance was not an unreasonable search because "there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin." *id.* at 285; see also Place, 462 US at 706-07 (special-

ly trained canine sniffing luggage is not an unconstitutional search because it is a "limited disclosure" and involves no "embarrassment and inconvenience"); Smith, 442 US at 746-46 (pen register, which discloses only the telephone numbers that have been dialed and not the content of communications, is not an unconstitutional search; United States v Lee, 274 US 559, 563 (1927) (searchlight that uncovered contraband from a distance was not an unconstitutional search). Thus, the mere fact that the police have employed relatively sophisticated forms of technological surveillance does not render the surveillance unconstitutional.[5]

[5]*"Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." Knotts, 460 US at 282. "the Supreme Court has repeatedly held that the fact that a surveillance device allowed for super- or extra-sensory perception is not fatal to a Katz analysis." Ford, 34 F3d at 997.*

A thermal imager, according to the government, is no more intrusive than theother animate and inanimate means of surveillance that the Supreme Court has concluded does not offend the Fourth Amendment. That is, like the trained canine in Place or the precise mapping camera in Dow Chemical, a thermal imager is an acceptable surveillance technique because it does not reveal intimate details within the structure being scanned. Instead, the government argues, the device assesses only heat differentials in objects and therefore poses no threat to the privacy concerns that the Fourth Amendment is intended to protect. The Ishmaels contend, however, that a thermal imager is the functional equivalent of an X-ray machine in that it allows officers to "see" within a structure what it otherwise

cannot see with the naked eye. Specifically, they argue, a thermal imager measures heat that is generated within a structure and, to that extent constitutes an unreasonable intrusion on one's Fourth Amendment privacy. The Ishmaels, echoing the district court below, see Ishmael, 843 F.Supp. at 212, argue that a thermal imager is the type of "sophisticated technology" that the Court in Dow Chemical warned law enforcement officials not to use without a warrant.

The Ishmaels overstate the device's capabilities. The device "does not intrude in any way into the privacy and sanctity of a home." Myers, ___ F3d at __. It "is a passive, non-intrusive instrument" in that "[i]t does not send any beams or rays into the area on which it is fixed or in any way penetrate structures

within that area." Penny-Fenney, 773 F.Supp. at 223. As the Eighth Circuit recently noted, "[t]he detection of the heat waste [is] not an intrusion into the home; no intimate details of the home [are] observed, and there [is] no intrusion upon the privacy of the individuals within." Pinson, 24 F3d at 1059.[6] The device, in other words, poses no greater intrusion on one's privacy than a precise mapping camera, an electronic beeper, or a pen register.

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[6]*The Ishmaels also overstate its accessibility, which also is a significant consideration. See Dow Chemical, 476 US at 238. As the district court in Deaner stated:*

> *The technology employed is "off the shelf," having been in general use for fifteen years. The device is utilized by many businesses for a variety of purposes, including the detection of roof leaks, steam pipe leaks, cracks in high voltage transmission lines and overloaded transformers. Several companies market the product, which is readily available through purchase, rental or the services of a thermographer.*

*Deaner, 1992 WL 209966, at *2.*

The manner in which a thermal imager was used in this case is equally significant in assessing the reasonableness of the intrusion. When the DEA performed its pre-dawn thermal readings in this case, the officers never physically invaded the Ishmael's residential or commercial curtilage. See Dow Chemical, 476 US at 237 ("[a]ny actual physical entry by EPA into any enclosed are would raise significantly different questions"). The district court below characterized the steel building as a "business," see Ishmael, 843 F.Supp. at 210, and recognizing that we can review the court's factual finding only for clear error, we will not disturb the court's finding.[7] But the court erred

[7] *We would reach the same conclusion even if we could apply a more exacting standard of review. Applying the four factors from United States v Dunn, 480 US 294, 300-03 (1987), the steel building clearly is beyond the Ishmaels' residential curtilage. The building, for example, stood 200 to 300 yards from the Ishmaels' mobile*

as a matter of law when it stated the following: "to say that the government could intrude up to the very windows of the building on the basis of the 'open fields' doctrine simply because it was outside the curtilage of a home would eviscerate the Fourth Amendment." *id.* The Supreme Court, in fact, has held precisely the opposite. In United Sates v Pace, 955 F2d 270 (5th Cir. 1992), law enforcement officers came abreast of the defendant's barn, which stood beyond the residential curtilage, and peered inside the barn to observe the defendant's drug operation. The defendant argued that the barn qualified as a business and that the barn's surrounding area was protected under a

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home and was not enclosed within a fence that also surrounded the home. See Ishmael 843 F.Supp. at 209-10.

theory analogous to the home curtilage theory in United States v Dunn, 480 US 294, 303-05 (1987), we conclude that "there is no business curtilage surrounding a barn lying within an open field." Pace, 955 F2d at 276.[8] The officers therefore were entitled to "come as close to the structure as necessary to look inside without physically entering." *Id.*

Similarly, the officers in this case were entitled to observe the steel building, either by air or foot because

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[8] *In Dunn, which involved facts nearly identical to those in Pace, the Supreme Court accepted for the sake of argument that the defendant's barn was a business. Dunn, 480 US at 303. The Court then stated:*

> *the officers never entered the bar, nor did they enter any structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.*

id. at 304.

the building, like the barn in Pace, stood in an open field. And, as we have already discussed, the fact that the officers enhanced their observations with a thermal imager does not require a different conclusion. The device, when used in an "open field," does not offend the Forth Amendment because it is passive and non-intrusive. The sanctity of one's home or business is undisturbed. We therefore conclude that the DEA's warrantless use of a thermal imager in this case was not an unconstitutional search.

III.

Having concluded that the warrantless use of a thermal imager was not unconstitutional in this case, we now turn to the question of whether the device's readings, in conjunction with the remainder of the evidence the DEA proffered to the magis-

trate judge, established the necessary probable cause to issue the warrant. In determining whether probable cause exists, "a magistrate judge must make a practical, common-sense decision as to whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v Byrd, 31 F3d 1329, 1340 (5th Cir. 1994). Reviewing courts (including district court) should afford a magistrate judge's decision "great deference." Illinois v Gates, 462 US 213, 236 (1983); United States v McCarty, 36 F3d 1349, 1356 (5th Cir. 1994); United States v Robertson, 39 F3d 891, 892 (8th Cir. 1994).

The totality of the circumstances in this case clearly indicates a fair proba-

bility that the Ishmaels were cultivating marijuana in the steel building's substructure. Rohn Ishmael, for example, was extremely careful not to reveal the need to the concrete re-mix. The substructure had been elaborately constructed with its own electricity supply and was being fed water from the nearby pond. The substructure's exhaust fan operated on a continuous basis. In addition, the Ishmaels phone records indicated that their phone had been used to call various horticulture shops, two of which appeared on a law enforcement computer data base. The Ishmaels' electric utility records demonstrated that the substructure was consuming an inordinate amount of power, particularly when compared to the mobile home's power usage. Finally, and perhaps most importantly, expert thermographers ana-

lyzed the two readings from the thermal imager and concluded that the inordinate amount of heat emanating from the substructure was consistent with indoor cultivation of marijuana. Construing this evidence in a "common-sense manner,"[9] we conclude that probable cause existed for the issuance of the warrant. See Robertson, 39 F3d at 893-94 (readings from a thermal imager, when combined with informant's tip and police officer's own observations, establish probable cause).

IV.

For the reasons stated above, the district court's order granting the Ishmael's motion to suppress is REVERSED and the case is REMANDED to the district court for further proceedings.

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[9]*Like the district court,...we construe the [government's] affidavit in a common-sense manner." McCarty, 36 F3d at 1356.*